

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION**

WRIT PETITION NO. 949

OF 2005 .

Sushil N. Sanghavi
V/s.
Lalit B. Sanghvi & ors.

... Petitioner.

... Respondents.

Shri A.A. Kumbhakoni with A.M. Kulkarni for the
petitioner.

Shri S.S. Patwardhan for respondent No.1.

CORAM : V.C.DAGA, J.

DATED : 6.3.2006.

P.C. :

. Rule returnable forthwith. Shri Patwardhan
waives service on behalf of respondent No.1. Heard
finally by consent of parties.

2. This petition is directed against the order
dated 22.7.2004 passed by the Civil Judge, SD,
Kohapur whereby the trial Court was pleased to treat
issue Nos. 1 & 2 leading to doctrine of
res-judicata and estoppel as preliminary issues.

3. Having heard both the parties, it is not
possible to say that issue Nos. 1 and 2 would not
be required to be proved by leading evidence.

4. In order to prove applicability of doctrine
of res-judicata, it will be necessary for the party
raising these issues to show that in the earlier

round of litigation the same property; and substantially same issue between the same parties was tried and decided.

5. So far as another issue leading to doctrine of estoppel is concerned, the party pressing into service has to prove that a representation was made by other side and the same was accepted by it and that it has acted to his prejudice.

6. It is, thus, clear that both the issues would require evidence. Both of them involve mixed questions of law and facts. In view thereof, trial Court was not justified in directing trial of the issues as preliminary issues at the preliminary stage of the suit.

7. The impugned order is thus unsustainable. The same is quashed and set aside. The trial Court is directed to proceed to dispose of the suit after recording evidence of both the parties.

8. The trial Court however shall be at liberty to record its findings first on issue Nos.1 and 2 and, then, may proceed to decide other issues, if necessary.

. Rule is accordingly made absolute in terms of this order with no order as to costs.

